DALLAS COUNTY
DISTRICT ATTORNEY
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MBJ

RQ-437

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Opinion Committee

July 2, 1992

Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Re: (a) Credit for time served in jail in various situations.
(b) Authority of county to hire a collection agency for collection of fines and costs.

Dear General Morales:

We respectfully request opinions on four questions, three of which concern whether a defendant is entitled to credit for time spent in jail under a variety of circumstances. The fourth question involves a county's authority to hire a collection agency for the collection of fines and court costs. The specific questions for which we seek opinions are:

(1) Does a trial court have the authority to credit a defendant's time served in jail prior to sentencing toward a fine and costs when the defendant is placed on probation?

(2) If, as a condition of probation, the defendant is required to submit a copy of his fingerprints to the sheriff, and the defendant goes into the jail for that purpose only, is the defendant entitled to credit for the time he was in the jail for that purpose?

(3) When a defendant is sentenced in more than one case at the same time, and is assessed a fine in each, in the absence of an order from the trial court, is the sheriff authorized to give the defendant credit on each fine for each day served, or is the defendant required to serve time for the fines consecutively?

(4) Does the Dallas County Commissioners Court have the legal authority to hire and pay a debt collection agency to collect delinquent fines and court costs?

The first question, again, is:

> **(1) Does a trial court have the authority to credit a defendant's time served in jail prior to sentencing toward a fine and costs when the defendant is placed on probation?**

A resolution of the first issue rests on a determination of the meaning of "sentence" in the following statute. TEX. CODE CRIM. PROC. ANN. art. 42.03, §2(a) provides as follows:

> In all criminal cases the judge of the court in which the defendant was convicted shall give the defendant credit on his sentence or period of confinement served as a condition of probation for the time that the defendant has spent in jail in said cause, from the time of his arrest and confinement until his sentence by the trial court.

TEX. CODE CRIM. PROC. ANN. art. 42.02 defines "sentence" as follows:

> The sentence is that part of the judgment, or order revoking a probated sentence, that orders that the punishment be carried into execution in the manner prescribed by law.

If "sentence" as used in Article 42.03, § 2(a) means, in the framework of the question posed above, the part of the order revoking probation, then there is no sentence until there is an order revoking probation. Article 42.03, § 2(a) thus does not apply to probated sentences until there is an order revoking probation.

Ex parte Eden, 583 S.W.2d 632 (Tex. Crim. App. 1979), dealt with an issue similar to the issue on which an opinion is sought.[1] In Ex parte Eden, the defendant was convicted of a felony and ordered to serve 60 days "shock probation" at the Texas Department of Corrections. The defendant had spent 49 days in jail awaiting trial, and sought credit of that time against the 60 day confinement. The Court of Criminal Appeals denied relief, relying on Art. 42.02 and Art. 42.03, Tex. Code Crim. Proc. Ann. The Court

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[1] The version of Art. 42.03 in effect at the time Ex parte Eden was decided did not include the words, "or period of confinement served as a condition of probation."

determined that a "sentence" is the trial court's formal action of committing a defendant to serve his period of punishment in jail or TDC. The trial court's action in giving the defendant shock probation was an order, which did not direct the judgment to be carried into execution as does a sentence. The Court held that since no sentence was entered when shock probation was ordered, the provisions of Art. 42.03, § 2 did not apply.

Although Ex parte Eden does not specifically address the issue of back time being credited toward a fine and costs, the situations are analogous. In both instances, the question is whether a defendant has been "sentenced" for purposes of Article 42.03, § 2(a). It seems that, in the context of credit for time served, a judgment placing a defendant on probation and assessing a fine is not a "sentence."

The Code of Criminal Procedure treats the payment of fine and costs as a condition of probation. TEX. CODE CRIM. PROC. ANN. art. 42.12, §11(a)(8) provides that the terms and conditions of probation may include a condition that the probationer pay his fine and court costs. Section (b) of that article again refers to the authority of a court to order the payment of a fine and court costs as a condition of probation.

An order placing a defendant on probation and assessing a fine is not, thus, a two-part judgment in which part of the defendant's punishment is probated and part ordered executed. The payment of the fine and costs is a condition of probation.

Traditional rules of legal interpretation teach that legislative intent may be discerned by the absence of comment where such might logically be thought to be found. TEX. CODE CRIM. PROC. ANN. Art. 42.01, states that a judgment should, among other things, reflect:

> (10) In the event of conviction where any probated punishment is assessed that the imposition of sentence is suspended and the defendant is placed on probation, setting forth the punishment assessed, the length of probation, and the probationary terms and conditions;

and

> (18) The date sentence is to commence and any credit for time served.

Applying the principle of *expressio unius est exclusio alterius*, the failure of the legislature to include in subsection (10) a provision allowing credit for time served clearly implies that the legislature did not intend that a probationer be allowed credit for time served at the time he is placed on probation. The conjunction in subsection (18) of "the date sentence is to commence" and "credit for time served" indicates a legislative intent that those two events be related.

In conclusion, it appears that Art. 43.02, § 2(a) is inapplicable when a defendant is placed on probation, because there is no "sentence" at that time. There is, thus, no authority allowing a trial court to credit time served toward the fine and costs when a defendant is placed on probation.

The second question for which we seek an opinion is:

> **(2) If, as a condition of probation, the defendant is required to submit a copy of his fingerprints to the sheriff, and the defendant goes into the jail for that purpose only, is the defendant entitled to credit for the time he was in the jail for that purpose?**

Prior law required, as a condition of misdemeanor probation, that the defendant, "submit a copy of his fingerprints to the sheriff's office of the county in which he was tried."[2] In 1974, an issue concerning the sheriff's duty to take a probationer's fingerprints was addressed in Attorney General Opinion H-463 (1974). That opinion stated that, under the statute then in effect, a probationer had a duty to either submit a sufficiently authenticated and clear copy of his fingerprints, or make himself available to the sheriff's office. With respect to the latter, the sheriff's office had the duty to take the fingerprints.

The law no longer mandates that the submission of fingerprints be a condition of probation. When a probationer is ordered to, "submit a copy of his fingerprints to the Sheriff," however, it appears that it is still a defendant's choice whether to submit an authenticated copy of his fingerprints or to allow the sheriff to take the fingerprints. When, therefore, a defendant goes to the jail to have his fingerprints taken, it because he has chosen to do so and not because he has been ordered to jail. His appearance at the sheriff's office for this purpose is for the probationer's own benefit and convenience. It should not be considered serving jail time.

Furthermore, the object of a visit to jail for the purpose of supplying fingerprints is not to punish the defendant. It should not be considered "time served" because it is not time spent in the sheriff's custody. Time spent at the jail for the purpose of supplying fingerprints is neither time served prior to sentencing, nor time served as a condition of probation, nor time served pursuant to a sentence. TEX. CODE CRIM. PROC. ANN. art.

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[2] TEX. CODE CRIM. PROC. ANN. art. 42.13 § 5(b)(10), *repealed by* Acts 1979, 66th. Leg., ch. 654, § 1, 1979 Tex. Gen. Laws 1514, effective August 27, 1979.

42.03, § 2(a) thus is not relevant to time spent supplying fingerprints.

The sheriff takes fingerprints of persons other than probationers. For example, TEX. ALCO. BEV. CODE ANN. § 25.07 requires that an applicant for a wine and beer retailer's permit submit a set of fingerprints to the county judge.[3] The statute also provides that the sheriff shall take the fingerprints of such an applicant. When applicants submit themselves to the sheriff's office to have their fingerprints taken, they clearly are not in custody. A probationer who submits himself to the sheriff for the taking of fingerprints is in a position similar to that of the applicant for a wine and beer retailer's license. Neither person is at the jail to serve time on a sentence. They are there for their own convenience in obtaining a set of fingerprints.

For the above reasons, a probationer who submits himself to the sheriff's office to have his fingerprints taken as a condition of probation is not entitled to credit for time served for the time he is at the jail for that procedure.

The third question for which we seek an opinion is:

> **(3) When a defendant is sentenced in more than one case at the same time, and is assessed a fine in each, in the absence of an order from the trial court, is the sheriff authorized to give the defendant credit on each fine for each day served, or is the defendant required to serve time for the fines consecutively?**

Prior to 1987, fines for two or more misdemeanors which were satisfied by confinement could not be served concurrently, but had to be served consecutively. Op.Atty.Gen. 1981, No. JM-107. In 1987, TEX. CODE CRIM. PROC. ANN. art. 43.09 was amended to add section (c), which provides as follows:

> In its discretion, the court may order that a defendant serving concurrent, but not consecutive, sentences for two or more misdemeanors may, for each day served, receive credit toward the satisfaction of costs and fines imposed for each separate offense.

A plain reading of the above statute is that credit for fines and costs on concurrent sentences is earned consecutively, in the absence of a court order directing that credit be awarded

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[3] A similar provision applies to applicants for a retail dealer's on-premise license. See TEX. ALCO. BEV. CODE ANN. § 69.07.

concurrently. The statute cannot be read to mean that, without an order, such sentences are to be served concurrently.

Further, in construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the former statutory provisions. TEX. GOV'T CODE ANN. §311.023(4). Former law provided that credit towards fines and costs on concurrent sentences was given consecutively. If the legislature's intent in adding section (c) had been to mandate that credit in such cases be given concurrently, the statute would have said so. As worded, however, credit is to be given consecutively, as it was prior to the enactment of section (c). Section (c) merely expands the trial court's authority in this situation.

The fourth question upon which we seek an opinion is:

(4) Does the Dallas County Commissioners Court have the legal authority to hire and pay a debt collection agency to collect delinquent fines and court costs?

Chapter 102 of the Texas Code of Criminal Procedure sets forth the costs to be paid by criminal defendants and allocates the fees or costs to various funds. Under TEX. CODE CRIM. PROC. ANN. art. 103.003 (Vernon Supp. 1992), district and county attorneys, sheriffs, constables, and justices of the peace may collect money payable under title II of the Code. TEX. CONST. art. XVI, §61, provides that all fees earned by district, county, and precinct officers shall be paid into the county treasury. Under section 113.902 of the Local Government Code, the county treasurer shall direct the prosecution for any debt owed to the county and shall supervise the collection of the debt. As the executive head of the county, the commissioners court also has the right to determine when to sue on a debt. Simmons v. Ratliff, 182 S.W.2d 827, 829 (Tex. Civ. App. - Amarillo 1944, writ ref'd).

TEX. CONST. art. V, § 18 provides that the commissioners court shall exercise such power and jurisdiction over all county business as is conferred by the constitution and laws of the state. Unless otherwise provided by statute, only the commissioners court has the authority to make contracts which are binding on the county. Anderson v. Wood, 137 Tex. 201, 152 S.W.2d 1084, 1085 (1941). The authority of the commissioners court to make a contract on the county's behalf is strictly limited to the power conferred either expressly or by reasonable implication by the constitution and statutes. Canales v. Laughlin, 147 Tex. 169, 214 S.W.2d 451, 453 (1948); Op. Tex. Att'y. Gen. No. JM-65 (1983). A county may contract with a private corporation to perform services that the county is authorized to perform itself; if the county does not have the authority to perform the specific service then payment to the corporation constitutes a donation of the county's funds in violation of TEX. CONST. art. III, § 52(a). Op. Tex. Att'y. Gen.

No. JM-65 (1983). If a county has the authority to contract with the corporation, then, in order to be valid under the constitution, the contract must serve a public purpose, the county must receive adequate consideration, and the contract must provide sufficient assurance that the public purpose will be served. Op. Tex. Att'y. Gen. No. JM-716 (1987).

Under TEX. CODE CRIM. PROC. ANN. art. 103.003, various county officers, not the commissioners court, are authorized to collect court costs. These officers must use all legal means to collect fees, fines, and court costs that are due. Op. Tex. Att'y. Gen. No. JM-749 (1987). TEX. CODE CRIM. PROC. ANN. art. 43.07 provides that in each case of pecuniary fine, an execution may issue for the fine and costs, and that the execution shall be collected and returned as in civil actions.

No statute specifically authorizes a commissioners court to hire and pay a debt collection agency to collect delinquent court costs and fines. No Attorney General's opinion has addressed the issue of the commissioners' authority to do so.

In conclusion, the greater weight of authority indicates that, with regard to the first three questions for which opinions are sought, (1) a trial court may not credit time served toward a probationer's fine and costs, (2) a probationer is not entitled to credit for time served for time spent at the jail for the purpose of providing a set of fingerprints, and (3) absent a court order, time is served consecutively for fines in concurrent cases. With regard to the fourth question, there is no explicit authority for the commissioners court to hire a debt collection agency for the collection of fines and costs; the commissioners court would have such authority only if such authority reasonably could be implied from the above statutory and constitutional provisions.

Respectfully submitted,

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